



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 385 OF 2016**

**BAYLEM LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**COUNTY GOVERNMENT OF NAIROBI.....DEFENDANT/APPLICANT**

**RULING**

1. These are Contempt of Court proceedings in which Baylem Limited (The Plaintiff or Baylem) seek that the County Secretary of the County Government of Nairobi and the County Chief Finance Controller of the County Government of Nairobi be committed to Civil Jail for disobedience of the Orders of this Court made on 3<sup>rd</sup> February 2017. Amongst the provisions of the Law cited in support of the Amended Notice of Motion dated 31<sup>st</sup> October 2017 are sections 3,4 (1) (a), 5, 7(i), 28(1), 28(6) and 36 of the Contempt of Court Act 2016.

2. Baylem was contracted to supply and install Mortuary Equipment as well as to renovate the Mortuary facility at Mbagathi Hospital Nairobi and did so successfully for and on behalf of the County Government. In that regard a sum of Kshs.110,000,000/- became due and owing. Payment was not forthcoming and Baylem instituted this suit.

3. In the face of an Application for Judgement on Admission, the County Government, on 3<sup>rd</sup> February 2017, entered a Consent Judgement as follows:-

“By Consent Judgement in favour of the Plaintiff be entered in the sum of Khs.110 million (Kenya Shillings One Hundred and Ten million) to be paid as follows:-

- a. Ksh.20 million (Twenty) to be paid within 7 days of today.
- b. Ksh 20 million (Twenty) to be paid by 31<sup>st</sup> March 2017.
- c. Ksh.30 (Thirty) million to be paid by 30<sup>th</sup> April, 2017.
- d. Ksh.30 (Thirty) million by 31<sup>st</sup> May 2017.
- e. The Plaintiff acknowledges payment of Ksh. 10 (ten) million being part of the sum of Khs.110 million.
- f. Mention on 9<sup>th</sup> March 2017”.

4. Had the County Government met the terms of the Consent, then it would have settled the entire debt of Khs.110,000,00/= by 31<sup>st</sup> May 2017 but there is common evidence by the parties herein that as at 14<sup>th</sup> June 2017 Khs.24,940,886/= had been paid as follows:-

9<sup>th</sup> December 2016- Khs.9,940,886

9<sup>th</sup> May 2017 – Khs.5,000,000

24<sup>th</sup> May 2017 – Kshs.5,000,000

However on the day of arguing the application Miss Fundi appearing for Baylem informed Court that a further sum of Kshs.32,042,191 was paid on 15<sup>th</sup> May 2018 and so Khs. 43,102,082/= on the principal remains unpaid.

5. In an affidavit sworn on 31<sup>st</sup> October 2017, J.F Ogumbo, the Managing Director of Baylem tells of the frustration his Company has faced in the matter. He displays copies of letters of 22<sup>nd</sup> February 2017, 3<sup>rd</sup> March 2017, 16<sup>th</sup> August 2017 and 22<sup>nd</sup> August 2017 in which the Officers of the County Government have been reminded of the obligation under the terms of the Consent Judgement but to no avail.

6. It is Baylem's case that the money owed to it had been set aside for disbursement but Dr. Robert Ayisi, the former County Secretary had deliberately failed to effect payment. Mr. Ogumbo says he became aware of this in a meeting he had on 19<sup>th</sup> February 2017 with the former Governor of the County Government in which the Governor expressed great shock and disappointment upon learning that Dr. Ayisi had not yet disbursed the money as agreed. That, in that meeting and in the presence of Mr. Ogumbo, the Governor admonished Mr. Ayisi and directed him to pay the money at once.

7. But still no payment has come forth.

8. Dr. Ayisi has since left office and Mr. Leboo Ole Morintat is the Acting County Secretary, at least as at 8<sup>th</sup> December 2017, when he swore a Replying affidavit on behalf of the County Government, Mr. Morintat depones that the failure to pay the Decretal sum is not willful but due to cash flow problems experienced by the County Government.

9. The Officer states that the County Government has a huge responsibility of carrying out functions to the Residents of Nairobi which includes Garbage collection, Street lighting, Water, Sanitation and Health Care Provision. That in addition, it has a huge work force inherited from both the Local Authority and Nairobi Government. The Officer also laments that the County Government is also paying debts ordered by other Courts.

10. Annexed to the affidavit of Mr. Morintat are copies of two letters. One is dated 27<sup>th</sup> March 2017 in which the Commissioner of Domestic Taxes declares the Principal Secretary of the National Treasury as the payer of Tax amounting to Khs.4,395,770,826 due from the County Government. In addition, is a letter dated 3<sup>rd</sup> May 2017 from Central Bank of Kenya showing that it has recovered Khs.1,017,393,208.00 from the Recurrent Account of the County Government and paid it to the Domestic Taxes Income Tax payee Account No.1000009877 on 3<sup>rd</sup> May 2017 in line with an Agency Notice.

11. This Court agrees with Counsel for the Plaintiff that the County Government entered into a Consent pursuant to which it was to pay the entire principal sum of Khs.110,000,000 by 31<sup>st</sup> May 2017. It cannot be gainsaid that the Consent being adopted as a Court Order needed to be complied with. The County Government is without doubt duty bound to pay the decretal sum. It is now over 14 months after the outside date of 31<sup>st</sup> May 2017 and a sum of Kshs.43,102,082 remains outstanding.

12. Nevertheless, whether or not the two Officers are culpable for contempt depends, not on the fact that the debt remains unattended, but on whether the non-failure is willful and without good or plausible cause or explanation. It has to be remembered that what the Officers are charged with is failure to pay a debt that is not personal to themselves but of The County Government. If the Officers demonstrate that they have done enough to attend to the debt but the matter is out of their hands due to insolvency of the Government in which they are blameless, then they cannot be guilty of contempt. Effort that can count in favour of the Officers may include diligently providing for the debt in the Government budget and pursuing all possible Revenue streams to pay. Guilt is only on a reluctant, obstinate, negligent or indiligent Officer. This is in much the same way as Civil Jail for failure to pay a debt is only for the intransigent or obstructive debtor and not one who is clearly unable to pay.

13. Now do the two Officers have a good reason for failing to pay the Decretal sum herein? The explanation they give, through Mr. Morintat, is that the County Government is experiencing financial difficulty and is unable to pay its salaries and meet its debts running into millions. While they show that the County Government has a Tax liability of Khs.4,395,770,826 the extent or schedule of other debts is not given. Neither is the Revenue or Budgetary support of the Government disclosed. For that reason the Court cannot objectively make a finding that the County Government is really technically insolvent and cannot pay this debt. The Officers have not done enough to explain the failure.

14. There is yet another unexplained matter. Mr. Ogumbo has on oath stated that in a meeting held on 19<sup>th</sup> February 2017, the Governor assured him that money to meet the Decree herein had been set aside and that he (the Governor) could not understand why the debt had not been paid. True, Mr. Morintat was not in that meeting but in his current capacity he is expected to know whether indeed money had been set apart to pay this debt. But Mr. Morintat is singularly salient on this matter. He neither denies nor confirms this and I have to believe what the Plaintiff asserts.

15. Something else, Mr. Morintat also depones,

“The Applicant also pays huge debts mostly inherited from the Local Authority most of those debts having been ordered by Courts that they be settled, default to which the Officers of the Applicant risk being jailed for disobedience like in the instant case”.

One may ask if the Defendant is paying other Decretal sums then why not this one?

16. This Court is well aware of the threshold of proof required to found a conviction for contempt of Court (higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. See [Mutitika v. Baharini Farm Ltd \[1985\] eKLR](#)). The Application met

that threshold. I find the two Officers in contempt of this Court's orders of 3<sup>rd</sup> February 2017. The Application of 31<sup>st</sup> October 2017 is therefore allowed. The Officers shall attend Court on a date to be shortly appointed for Mitigation and Sentencing.

**Dated, Signed and Delivered in Court at Nairobi this 27<sup>th</sup> day of July, 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Munya for the Applicant

N/A for Respondent

Nixon - Court Assistant